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December 23, 2004

The Honorable Dickinson Debevoise, Jr.
United States District Judge
Dr. Martin Luther King, Jr. Federal Building and Courthouse
50 Walnut Street, Room 5083
P.O.Box 999
Newark, N.J. 07101-0999

Re: Newark Coalition for Low Income Housing et al v. NHA and HUD, No. 89-1303

Dear Judge Debevoise:

As we discussed during the hearing on November 12, 2004, on the NHA's most recent construction report, the Plaintiffs are concerned that the NHA is taking actions that have the effect of diminishing the supply of new public housing rental units constructed as required under the settlement agreements. More specifically, these actions include counting as replacement units under the settlement agreements, units which are to be converted from rental units to home ownership units and removed from the public housing inventory.[1] These actions would diminish the supply of permanent or long-term low income units previously agreed to be constructed to compensate for the destruction of thousands of previously constructed units, at a time of great scarcity in affordable housing in Newark and Northern New Jersey. Such actions run afoul of the letter and spirit of the settlement agreements and, in addition, violate HUD regulations on replacement requirements for units converted to homeownership. Finally, we have received Susan Barone's December 6, 2004 letter to the Court regarding the status of home ownership sales at Mt . Pleasant Estates. In order to clarify the Plaintiffs' position with respect to Ms. Barone's concerns: we have no objection to limited home ownership opportunities for the 26 units currently under a contract for purchase; rather, we only object to the counting of those units as replacement public housing units under the court's orders and/or the failure to replace those units with other long-term public housing units.

[1] See e.g. Exhibit 1 to this letter, Section 5(h) Implementing Agreement, p.2, Section 2.2.

Factual Background.

In 1989, after months of court supervised mediation and negotiation between the parties, this Court approved a Settlement Agreement ("SA") that provided for the construction of 1777 "public housing units" in exchange for the demolition of Columbus Homes. *See* SA ¶¶ 8, 7a. The express principal purpose of this agreement for all of the parties (Plaintiffs, NHA and HUD alike) was set out in its text: "**WHEREAS, the parties herein expressly desire to provide housing for as many low-income families as possible with the limited resources available for such housing in the City of Newark.**" SA p.2. The Amended Settlement Agreements ("ASAs") of 1995, and 1996, and the Settlement Agreement of 1999, reiterated that the NHA "shall build 1,777 units of public housing." September 22, 1995 ASA, pp. 3-4, ¶ IV. A.1.; July 30, 1996 ASA, p. 3, ¶ IV.A.1. ; May 25, 1999 SA, p.5. ¶ V.A.1. In 1994, the NHA purchased Mt. Pleasant Estates (42 units), and designated it as NJ2-51. The NHA has expressly represented that the Mt. Pleasant home ownership units and its site originally "was designed for market rate condominium ownership and not as public housing rental units." (See Exhibit 1, Homeownership Plan for the Housing Authority of the City of Newark, Mt. Pleasant Estates, N.J. 2-51), p.4. This was a development that had been started as market rate condominium development, but had been abandoned by the developer.

The NHA stated that it would rehabilitate the project. In December, 1995, the NHA reported to the Court that the construction for Mt. Pleasant Estates was complete. (See Construction Report of December 15, 1995). In October 2000, one and one-half years after the May 1999 SA, and 5 years after the NHA "completed" the rehabilitation of NJ 2-51, the NHA applied to HUD to approve a homeownership plan for Mt. Pleasant Estates. (Exhibit 1 to this letter). In February 2001, HUD approved the NHA's application. Thus, the units, originally contemplated and built for market rate condominium purposes, served as "public housing units" for **only 5 years** before the NHA was seeking to commence a process for their eventual sale, privatization, and return to market rate status. While the NHA now apparently claims that the Mt. Pleasant units can simultaneously serve as replacement public housing units under the settlement agreements and as privately owned homes, nothing in the homeownership application submitted to and approved by HUD indicates that the units were in any manner intended to serve as replacement units to satisfy the court supervised settlement agreements.

The application for Home Ownership provides for substantial renovation of Mt. Pleasant Estates, and their resale not simply to tenants who meet public housing guidelines but rather to those who can afford to purchase. There are thus, additional income eligibility requirements for the purchase.[1] The application stated that the repairs would be "extensive," would cost an estimated $83,000/unit, or $3,469,000 to repair and rehabilitate all units, and "will meet the more stringent criteria of local code or HQS standards for housing quality." (Exhibit 1, p. 6)

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1. The NHA Plan provides that to be eligible for homeownership, a family must meet the "minimum income standard for homeownership." *See, e.g.*, Exhibit 1, NHA Plan, pp. 8-9, Section 3.0. Based upon one affordability standard homeowners would have to earn $24, 660 per year to afford a home. Plan, p. 13. Based upon another option (the lease to purchase program) a family must earn $22,410 to complete the lease transfer contract. Plan, p.10.

Apparently the construction had not been completed in December, 1995, as reported to the Court, or the construction, was inadequate and had fallen apart.[1]

The units are to cost $54,000 for 3-bedroom units and $48,600 for 2-bedroom units. Exhibit 1, p.3. According to the plan, the sales will generate approximately $2,300,000 to the NHA. After ten years, the homes can be sold on the open market to the highest bidder and completely privatized as at that time, "all sales proceeds will accrue to the owner." Exhibit 1, p. 15.[2] At the November 12, 2004 hearing in open court, Mr. Lofton stated that the NHA had no plans to replace these homeownership units with rental public housing units. This confirms the NHA's application for homeownership which states that there was no plan for replacement. (Exhibit 1, p.17, Section 12.0).

Under the NHA's position, taken to its extreme, every one of the 1777 units required for satisfaction of the court supervised settlement agreements could be converted to home ownership and then later sold to the highest bidder and privatized. Thus, the NHA would have succeeded in removing 1777 units of the affordable housing for low-income families in Newark. This is especially devastating in light of the substantial loss of Newark public housing units, and continued threats to the existing inventory.[3]

I. The NHA's Attempt to Count as "Replacement Public Housing Units" for the Long-Term Public Housing Rental Apartments That Were Demolished, the NJ-2-51 (Mt. Pleasant Estates') Home Ownership Units That Are Being Sold and Fully Privatized, Violates the Settlement Agreements.

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[1] By March 14, 1995, all units at NJ 2-51 were occupied. Letter from Edward Fox, Project manager to Joseph Bianco, dated March 14, 1995. On June 15, 1995 Mr. Fox reported that: "(l)atent defect work and punch list items have been completed. The NHA has settled with the developer and closed this project." The NHA's December 15, 1995 construction report to the Court stated that:

> This project consists of 42 units on Mt. Pleasant Avenue, Governeur Street and Broad Street. The Authority has completed this project and has paid all retention to the Developer. As agreed, the Authority retained $153,000 reflecting its cost to complete punch-list items and latent defects.

[2] Of the 42 units at Mt. Pleasant, at least 22 new homeowners have signed contracts to purchase well over a year ago. *See* Letter from Susan Barone to the Court, dated December 6, 2004. Four tenants have actually purchased units. Id. This means that at most, 16 units are not under contract for purchase. According to Ms. Barone, the owners who are under a contract to purchase have made down payments.

3 The NHA has already demolished all family high rise buildings. Further, the NHA has identified all of the old low-rise projects, Baxter Terrace, Felix Fuld Homes, Pennington Court, Hyatt Court, Terrell Homes, and Bradley Court as candidates for "voluntary conversion," which means that they can be demolished, and replaced with Section 8 vouchers. NHA Annual Plan, 2004-2005, p. 45. See 24 CFR § 972.200. If this occurs, the only family projects will be the Columbus Homes Replacement Housing.

The Supreme Court and the Third Circuit have recognized that a consent decree is an agreement which should be construed as a contract *See* United States v. I.T.T. Continental Baking , 420 U.S. 223, 238 (1975); Fox v. U.S. Dep't of Housing & Urban Development, 680 F.2d 315, 319-20 (3d Cir. 1982); *see generally* 46 Am Jur. Judgments § 219 (May 2004). Ordinarily the court should confine itself to the four corners of the agreement in determining the parties' intent unless terms are clearly ambiguous. *See* Fox, 680 F.2d at 319. Reliance on certain aids to construction, such as the "circumstances surrounding the formation of the consent order" are always appropriate and do not depart from the "four corners" rule. I.T.T. Continental Baking, 420 U.S. at 238. Consent decree language "must be interpreted in accordance with its generally prevailing meaning unless the parties manifest a different intention or the words are technical." Fox, 680 F.2d at 320. "[A]nd, if the principal purpose of the parties is ascertainable, it is given great weight." 46 Am. Jur. Judgments at § 219.

With those interpretative principles in mind, it is inconceivable that the settlement agreements could be construed to permit the counting of the Mt. Pleasant Estates' home ownership units, that can be sold and fully privatized to the highest bidder, as "replacement public housing." First, such a construction would unquestionably reduce the 1777 public housing unit replacement requirement. The NHA agreed to construct 1777 "public housing units" in exchange for the units to be demolished at Columbus Homes. SA ¶ 8.[1] The agreement contemplated that the replacement units remain as replacement units. Once they are sold and removed from the NHA's public housing inventory there is no longer the replacement required by the Settlement Agreements.

Second, and more fundamentally, the units demolished at Columbus were unquestionably **public** housing units. They were only available to low-income families and they remained both public and only available to low-income families for the entirety of their existence. Accordingly, this means the units to be counted as "replacement units" for those demolished at Columbus must have the same characteristics as a matter of generally accepted common usage in the absence of some indication or intent to deviate from such usage. Again, those units would be long-term, public housing units available to low-income families.

Third, unlike many settlements, the principal purpose of all of the parties in the settlement here (Plaintiffs, NHA and HUD alike) is fully ascertainable from the four corners of the 1989 Settlement Agreement and was expressly and unambiguously stated by the parties: **"WHEREAS, the parties herein expressly desire to provide housing for as many low-**

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[1] The Amended Settlement Agreements each reiterated the commitment to replace demolished public housing units with new public housing units. The 1995 Amended Settlement Agreement [(ASA) incorporated the terms of the 1989 agreement and stated that the NHA, "in accordance with the 1989 Settlement Agreement," "shall build 1,777 units of public housing . . . ." ASA September 25, 1995, p. 3 ¶ IV.A.1. Similarly the Amended Settlement Agreements of July 30, 1996 and May 25, 1999 also stated that the NHA "shall build 1,777 units of public housing. . . . ." ASA, July 30, 1996, p.3,¶ IV.A.; SA May 25, 1999, p. 5, ¶ V.A.

income families as possible with the limited resources available for such housing in the City of Newark." SA p.2.

On this basis alone, the counting of home ownership units that can be sold and privatized for the benefit of a few and not maximized for the use of a substantially greater number of low-income families, is inconsistent with the decree. Selling and privatizing public housing into market rate homeownership violates the express overriding purpose of all three parties to the settlement: maximizing public housing for "as many low-income families as possible."

Finally to the extent this Court believes that resort to the circumstances surrounding the formation of the original settlement is needed, *see* I.T.T. Continental Baking at 238.; *see also* Lloyd C. Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation,* 1983 U. ILL. L. REV. 579, 620-32, the original complaint makes clear that this case was always principally directed to the preservation and maximization of low-income public housing for as many needy families as feasible in a time of great scarcity and desperate residential circumstances in Newark and Northern New Jersey–not to home ownership and private market sale rights for the few.

As set out in the original complaint in this case, Plaintiffs detailed "The Need for Public Housing and the Lack of Affordable Housing in Newark:"

> 36. The defendant NHA owns more than 12,000 units of public housing in the city, constructed pursuant to federal and state legislation to provide decent and safe low-income housing for the poor.
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> 37. There is a substantial need and demand for public housing units in Newark, evidenced by an enormous waiting list of families seeking admission. This list was found to be as high as 13,000 by HUD in 1986, and recently conceded by the NHA itself to include over 7,000. Moreover, based on the information and experience of plaintiffs, for at least two years the NHA has been refusing to take new applications for public housing, except for elderly units.
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> 38. Newark's homeless population is further evidence of the severe need for public housing. A reported recent estimate by a Newark city agency cites some 16,000 homeless people in the city, up from an estimated 8,500 in 1984.
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> 39. The critical shortage of housing for the poor in Newark is further indicated by the large number of people living in dilapidated, substandard, unhealthy and hazardous conditions, or in oppressively overcrowded situations. The 1988-1991 Housing Assistance Plan for Newark states that there are 14,055 occupied substandard units of housing in the city.
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> 40. There has been a steady and marked decline in Newark's affordable and decent housing stock for many years, due to speculation, demolition, abandonment, redevelopment, gentrification, construction of freeways, housing

code enforcement, building fires, and other factors. According to one expert "Newark's housing stock is old, rapidly diminishing, and is in so poor condition that it clearly qualifies as being one of the worst in the nation."

41. The vast majority of persons who are eligible for and need public housing are welfare recipients. In Newark and Essex County, as well as the rest of New Jersey, the fair market values of private rentals exceed the basic welfare grant levels. As a result, many families live in apartments for which rents and utilities constitute a disproportionate share of their income, preventing them from having necessary funds for other essentials such as food, clothing, and transportation. In sum, welfare recipients and the poor in general simply cannot afford housing in the private market and still have resources for the other basic necessities of life. In contrast, under federal law public housing tenants cannot be required to pay more than 30% of their income for rent and utilities. See 42 U.S.C. 1437a(1). This protection makes public housing affordable to the poor, and for many it is the only housing they can afford.

Plaintiffs then detailed the substantial NHA actions to reduce the supply of public housing:

44. In the face of this huge need for safe and decent low-income housing in Newark, the NHA has taken and continues to take numerous steps to reduce the public housing supply. Specifically the NHA has taken the following actions.

(a) It has undertaken an extensive plan for demolishing existing NHA housing units in 39 mid-and high-rise buildings, targeting the eventual destruction or disposition of at least 5,752 out of an original 13,133 units, without any provision to create at least one new unit for each unit destroyed; current plans call for replacement of only a fraction of the units which have been or will be destroyed. This is the most sweeping demolition plan of its kind in the country. (emphasis added)

* * *

(e) Summary – planned demolition for Scudder, Hayes, Kretchmer, Columbus:

The-NHA has received approval to demolish 3,022 units, (including the 816 already demolished). It also sought approval to demolish an additional 1,742 at Hayes and Scudder, for a total planned demolition of 4,764, in the application that was returned to the NHA by HUD. In contrast, the NHA has received a firm commitment of funding for only 519 units of new construction. Of these, 101 are at the site of the Hayes/Scudder demolition, 124 originally scheduled for the Hayes/Scudder and currently have no site, 100 are located at other sites in the Central Ward, and 194 represent HUD's commitment as a part of the first year of one-for-one replacement for Columbus Homes. Further, in response to the NHA "replacement plan" for the Columbus

> demolition, HUD has also agreed to commit funding for an additional 1,312 units, "subject to appropriations."
>
> The net loss of units, in these few projects alone, even if the additional 1,312 units were realized, will be 2,919, a staggering loss of housing capacity.

Complaint in Newark Coalition for Low-Income Housing v. Housing Authority of the City of Newark, pp. 10-15. (footnote omitted).

In summary, under the background circumstances leading to this lawsuit and about which the parties grappled for months in court-supervised mediation before reaching agreement, it is inconceivable that replacing scarce public housing units for the many low-income families with units that could be sold, owned and privatized at market prices for the benefit of a few, is NOT consistent with the parties' intent, and a reasonable construction of the contract.[1]

II. Apart from the Settlement Agreements, The NHA's Plan to Convert Mt. Pleasant Estates to Home Ownership Units Violates Applicable HUD Regulations Requiring A One-For One Replacement Plan.

A separate and independent ground (apart from the settlement agreement and its intent), for precluding the conversion of low-income public housing apartments to potentially higher income private homes without replacement, are the applicable federal regulations under Section 5(h) of the National Housing Act. The Mt. Pleasant Estates units are apparently constructed under section 5(h) of the Act, 42 U.S.C. sec 1437 et seq. (See Exhibit 1, Mt. Pleasant Section 5(h) Implementing Agreement, Appendix p. 1 to NHA's Homeownership Application).

A. Regulations.

On November 10, 1994 HUD issued a final rule governing the Section 5(h) Homeownership Program for public housing. 59 FR 56354. That regulation required that there must be replacement housing for each of the units sold under a homeownership plan. 24 CFR §

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[1] The NHA has not even sought a modification of the settlement agreement as would be required to accomplish its goal of replacing scarce long –term public housing units for many low-income families with units that could be sold, owned and privatized at market prices for the few. This court has noted that there are three circumstances permitting modification: "(1)when changed factual conditions make compliance with the decree substantially more onerous;" (2) "when a decree proves to be unworkable because of unforeseen obstacles;" or (3) "when enforcement of the decree without modification would be detrimental to the public interest." Denike v. Fauver, 3 F. Supp. 2d 540, 545 (D.N.J.1998) None of these circumstances is present in the instant case. The NHA's action to sell was voluntary, and not required by changed factual circumstances, unforeseen obstacles, or a detriment to the public interest that would be served if the housing remained in the public housing inventory available to the poor in accordance with the settlement agreements.

906.16 (1994); 59 FR 56370. In 1998 new national legislation, the Quality Housing and Work Responsibility Act of 1998 (QHWRA), added a new Section 32, which authorized a new public housing homeownership program.[1]

On September 14, 1999 HUD proposed a new homeownership regulation to implement the new homeownership statute under QHWRA. (Section 32) The statute and the proposed regulation eliminated the requirement of one-for-one replacement for units sold under the homeownership program.[2] However, on December 22, 1999 HUD issued an administrative guidance for the homeownership process. It provided that until the proposed Section 32 regulation became a final rule, that HUD will process homeownership proposals under its Section 5h regulations, 24 CFR 906.[3] This included a requirement for one-for-one replacement for each unit sold into homeownership. 24 CFR § 906.16. 24 CFR § 906 was revised on April 1, 2002 (but it continued the one-for one replacement requirement see 24 CFR §906.16 (2002)). On March 11, 2003, the new Section 32 regulation, proposed on September 14, 1999, became a final rule.[4] It eliminated the requirement of one-for-one replacement formerly contained in 24 CFR §906.16. It provided, however, that:

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[1] Section 536 of the Quality Housing and Work Responsibility Act of 1998 (Title V of Public Law 105-276, 112 Stat. 2461, approved October 21, 1998) ("Public Housing Reform Act") amended Title I of the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) (1937 Act).

[2] 64 FR 49932 (Sept. 14, 1999); See also 68 FR 11, 714, p. 2.

[3] The guidance provides:

> Section 536 – Public Housing Homeownership. Section 536 of the Public Housing Reform Act, which became effective October 1, 1999, adds section 32 to the 1937 Act, which authorizes a new public housing homeownership program that replaces, but is substantially based on, the former "Section 5(h) program." As noted earlier in this notice, HUD published a proposed rule to implement section 536 on September 14, 1999. The public comment period for this rule closed November 15, 1999.
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> Until the final rule is published, HUD will process public housing homeownership proposals under its Section 5(h) program regulations at 24 CFR part 906. As noted, the Congress modeled section 32 on the Section 5(h) program, and there are many similarities between section 32 and the part 906 regulations. Accordingly, the use of 24 CFR part 906 until rulemaking on section 32 is completed is consistent with Congressional intent. Further, the use of the part 906 regulations will permit HUD to process homeownership proposals using well established regulatory requirements. 64 FR 71810

[4] 64 FR 11714 (March 11, 2003).

> Any existing section 5(h) or Turnkey III homeownership program continues to be governed by the requirements of part 906 or part 904 of this title, respectively, contained in the April 1, 2002, edition of 24 CFR, parts 700 to 1699. 24 CFR § 906.3(a); 63 FR 11722 (March 11, 2003). (emphasis added).

The NHA applied for its Section 5h homeownership plan in approximately October 2000, and HUD approved it on February, 2001. At this time, homeownership plans were governed by 24 CFR § 906, as adopted on November 10, 1994, 59 FR 56354.[1] As of March 11, 2003, when the new Section 32 regulation was finalized, existing Section 5h homeownership programs (such as the NHA plan) continued to be governed by 24 CFR § 906 as set forth on April 1, 2002. Both the 1994 and 2002 regulations contain identical one-for-one replacement requirements. 24 CFR §906.16.

B. Facts

The NHA's application did not contain a replacement plan for units to be sold into home ownership. The NHA's application stated:

> Homeownership transfer of public housing is exempt from disposition rules. One-for-one replacement has been repealed. However, the Authority will respond to replacement housing vouchers NOFAs should they be issued by HUD.

Exhibit 1, NHA Plan, October 23, 2000, p.17, Section 12.0. Plaintiffs are unaware whether the NHA has subsequently received replacement housing vouchers from HUD. However, on November 12 , 2004, the last hearing in this case, Mr. Lofton, counsel for the NHA stated that the NHA had no plans to replace these homeownership units with rental public housing units.

> C. The NHA's Section 5h Homeownership plan violates the requirement of one-for-one replacement under 24 CFR § 906.16.

As previously noted, 24 CFR § 906.16 (2002), which is applicable to this homeownership plan, requires one-for-one replacement of units sold under a homeownership program. 24 CFR § 906.16(a) provides:

> As a condition for transfer of ownership under a HUD-approved homeownership plan, the PHA must obtain a funding commitment, from HUD or another source, for the replacement of each of the dwellings to be sold under the plan.

In October 2000, when the NHA applied for a homeownership program, the NHA did not have a plan for one-for-one replacement. The requirement for one-for-one replacement was in effect at that time, and continues to be in effect. The failure to have a one-for-one replacement plan violates federal regulations.

CONCLUSION

For the reasons submitted, plaintiffs respectfully request that the Court order compliance with the letter and intent of the settlement agreements and bar the counting of homeownership units towards the 1777 replacement public housing units required to be constructed under the settlement agreements. Further, the Court should require that there be one-for-one replacement for each of the 26 units that have been sold or are currently under a contract for purchase and should bar any further homeownership sale activity at NJ-2-51 or at any other of the 1777 public housing units that comprise the replacement plan under the settlement agreements.

Respectfully Submitted,

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[1] See n. 3 and accompanying text at p. 8 supra and p. 8 supra.